IN THE

SUPREME COURT OF THE UNITED STATES.

No. 666

OCTOBER TERM, 1966.

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

J. LEONARD WALKER,
140 South Fifth Street,
Louisville, Kentucky,
HOWELL W. VINCENT,
130 Park Place,
Covington, Kentucky,
Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

CASES CITED.

Page

Henderson v. United States, 202 F. 2d 400, 406 (C. A. 6, 1953) 3

United States of America v. Benson, 369 F. 2d 569, 6th Circuit, decided December 15, 1966 ..... 1, 3

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners respectfully request leave of this Court to file this Supplemental Petition for Rehearing for the reason that counsel for petitioners discovered in the advance sheets of the Federal Reporter dated February 6, 1967, delivered to his office February 9, 1967, that the United States Court of Appeals for the Sixth Circuit decided a case December 15, 1966, which has great bearing and appears decisive of one of the questions discussed in the Petition for Rehearing.

In the case of United States of America v. Benson, 369 F. 2d 569, 6th Circuit, decided December 15, 1966, Benson was convicted for storing a stolen automobile.

Upon cross-examination of a defense witness, Government counsel was permitted to show that some thirty years before, the witness had been convicted of a felony and served a prison sentence, and the District Attorney then proceeded to inquire whether the witness "had many other charges." Upon objection the District Judge told the jury that they were not to consider charges and announced the familiar rule: "It is convictions that may be considered by the jury in weighing this man's testimony and the convictions must involve moral turpitude."

The Government attorney then, . . . proceeded over objection to disclose that the witness had been charged, but acquitted of, "violation of age of consent" some thirty-two years before when the witness was a teenage boy.

The Court said at page 572:

> It was proper to test the witness' credibility by showing previous convictions, but we consider that the foregoing examination violated the rule which the District Judge had already announced. Such was the correct rule. In Henderson v. United States, 202 F. 2d 400, 406 (C. A. 6, 1953), we said,
>
> > "* * * the cross-examination should be limited to showing convictions for felonies or crimes involving moral turpitude."
>
> We were there dealing with cross-examination of a defendant charged with crime who had taken the stand in his own defense. But such rule applies to the cross-examination of any witness whose credibility is in issue. Rizzo v. United States, 304 F. 2d 810, 831 (C. A. 8, 1962), cert. den. 371 U. S. 890, 83 S. Ct. 188, 9 L. Ed. 2d 123; Ramirez v. United States, 294 F. 2d 277, 284 (C. A. 9, 1961); 3 Wigmore, Evidence, § 980a (3rd ed. 1940). It is true that greater liberality is indulged in the cross-examination of a character witness as to his knowledge of arrests of and

charges made against the defendant whose character is the subject of the inquiry. Accord, United States v. Gosser, 339 F. 2d 102, 112 (C. A. 6, 1964). But the freedom in this regard remains qualified as Mr. Justice Jackson noted:

> "[The] rule is sometimes confused with that which prohibits cross-examination to credibility by asking a witness whether he himself has been arrested.
>
> "Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness." Michelson v. United States, 335 U. S. 469, 482, 69 S. Ct. 213, 221, 93 L. Ed. 168, 177 (1948).

The government has neither urged nor demonstrated that the proof of appellant Benson's guilt was so overwhelming that we should overlook the examination as not affecting his substantial rights. 52 (a) F. R. Crim. P. We are, therefore, constrained to order a new trial.

In the Benson case the Court quoted with approval the case of Henderson v. United States, 202 F. 2d 400, 406 (C. A. 6, 1953).

In the **Henderson** case the defendant was convicted for violation of the mail fraud statute. The Circuit Court of Appeals held, inter alia, that evidence of existence of a scheme to defraud and use of mail pursuant thereto was sufficient for jury, but that admitting evidence pertaining to defendant's court martial record 27 years earlier was error.

The Court after disposing of certain matters of evidence stated on page 405:

A more serious question is presented by appellant's contention that the District Judge erred in permitting the Government to cross-examine him, over objection, about an Army court-martial in 1925. Government counsel brought out by this cross-examination that the appellant had gone AWOL (Absent Without Official Leave) several times during his enlistment in the Army about 1925, and had had several court-martials. On re-direct examination, appellant stated that he had been absent without leave several times, but returned voluntarily to his assignment; that he had served several short periods of time in the guard house for what he thought was AWOL; and that he served out his enlistment and received an honorable discharge. The District Judge instructed the jury that the evidence could be considered only on the question of the credibility of the witness.

It is well settled that when a defendant in a criminal trial takes the stand in his own defense he waives immunity from cross-examination, and is, like any other witness in the case, subject to impeachment as to his credibility. Banning v. United States, 6 Cir., 130 F. 2d 330, 337. It is likewise settled that for the purposes of such impeachment it is competent to show that the witness has been previously convicted of a felony. McLendon v. United States, 6 Cir., 13 F. 2d 777, 778. There is some conflict in the authorities as to whether the accused may be cross-examined as to a prior conviction of a misdemeanor, or whether such cross-examination is limited to convictions for felonies or crimes involving moral turpitude. See Annotation, 103 A. L. R. 350, 362, 365.

Rule 26, Rules of Criminal Procedure, 18 U. S. C. provides that the admissibility of evidence and the competency and privileges of witnesses in criminal trials in the federal courts shall be governed, except

when an Act of Congress or the Rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. Funk v. United States, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369; Wolfle v. United States, 291 U. S. 7, 12, 54 S. Ct. 279, 78 L. Ed. 617. At common law the inquiry was limited to felonies or crimes involving moral turpitude. Wigmore on Evidence, 3rd Ed., § 980 (2) (a), 519, 520; Campbell v. United States, 85 U. S. App. D. C. 133, 176 F. 2d 45; Keith v. State, 127 Tenn. 40, 44, 152 S. W. 1029; Coble v. State, 31 Ohio St. 100; Bartholomew v. People, 104 Ill. 601; See Nesbit v. Cumberland Contracting Co., Md., 75 A. 2d 339, 20 A. L. R. 2d 1212. We are of the opinion that the cross-examination should be limited to showing convictions for felonies or crimes involving moral turpitude. Middleton v. United States, 8 Cir., 49 F. 2d 538, 540; Haussener v. United States, 8 Cir., 4 F. 884, 887; United States v. Montgomery, 3 Cir., 126 F. 2d 151, 155; Scaffidi v. United States, 1 Cir., 37 F. 2d 203, 211; Solomon v. United States, 1 Cir., 297 F. 82, 94; See Banning v. United States, supra, 6 Cir., 130 F. 2d 330, 337; Pearson v. United States, 6 Cir., 192 F. 2d 681, 699; Mitrovich v. United States, 9 Cir., 15 F. 2d 163, 164, C. A. 9th; Contra: United States v. Cohen, 2 Cir., 177 F. 2d 523, 525. Under this view of the law, it was error for the District Judge to admit the evidence pertaining to appellant's court-martial record some twenty-seven years prior thereto. People v. Flynn, 275 App. Div. 350, 89 N. Y. S. 2d 28; People v. Wilson, 400 Ill. 461, 81 N. E. 2d 211. See Grigsby v. Commonwealth, 299 Ky. 721, 187 S. W. 2d 259, 159 A. L. R. 196; Powell v. Commonwealth, 308 Ky. 467, 214 S. W. 2d 1002; People v. Levan, 295 N. Y. 26, 64 N. E. 2d 341.

Petitioners sincerely believe that due to the inconsistency of the verdicts rendered in this case and the fact that there was a hung jury in the first trial, that the permitted questions propounded upon cross-examination to petitioner, Lester, of a reprimand by a Circuit Court more than thirty years ago and of his non-professional conduct may well have been the sole reason for his conviction and was highly prejudicial to his substantial rights and requires a reversal of this case for a new trial.

CONCLUSION.

It is accordingly urged that upon consideration of the Petition for Re-hearing that the Petition for Writ of Certiorari be granted.

J. LEONARD WALKER,
140 South Fifth Street,
Louisville, Kentucky,

HOWELL W. VINCENT,
130 Park Place,
Covington, Kentucky,
Counsel for Petitioners.